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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

JOHN ZARUBA, DuPage County Sheriff, in his official capacity and as agent of DuPage County Sheriff's Department,

Petitioner,

v.

JUNE FRANKLIN and KAREN HUFF,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

I. Did the Seventh Circuit infringe on the sovereign right of the State of Illinois to determine its own structure of government by judicially declaring the existence of a suable governmental entity that is non-existent under the laws of the State of Illinois?

PARTIES TO THE PROCEEDINGS

Respondents June Franklin and Karen Huff brought this action against the DuPage County Sheriff, in his official capacity, and the DuPage County Sheriff's Department. Pursuant to Federal Rule of Appellate Procedure 43(c), current Sheriff John Zaruba was substituted for former Sheriff Richard P. Doria, Sr.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 150 F.3d 682 and is reprinted in the Appendix. (App. 1-6) The orders of the United States District Court for the Northern District of Illinois have not been reported. They are reprinted in the Appendix. (App. 7 and 9).

JURISDICTIONAL STATEMENT

Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1). The Court of Appeals for the Seventh Circuit entered judgment on July 17, 1998. (App. 1). Petitioner filed a Petition for Rehearing, which was denied on August 28, 1998. (App. 10). This Petition for *Writ of Certiorari* was filed within 90 days of the denial of the Petition for Rehearing.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Article IV, §§ 1, 2 and 4; United States Constitution, Amendment X; United States Constitution, Amendment XI; United States Constitution, Amendment XIV, §§ 1 and 5; and 42 U.S.C. § 1983 are implicated in this case.

United States Constitution, Article IV, § 1:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. . . .

United States Constitution, Article IV, § 2:

> . . . A Person charged in any State with Treason, Felony, or other Crime, who shall flee from

> Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime. . . .

United States Constitution, Article IV, § 4:

> The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion. . . .

United States Constitution, Article VI:

> . . . all executive . . . officers, both of the United States and of the several States, shall be bound by oath or affirmation to support this Constitution. . . .

United States Constitution, Amendment X:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or the people.

United States Constitution, Amendment XI:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or Subjects of any Foreign State.

United States Constitution, Amendment XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the

> State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Constitution, Amendment XIV, § 5:

> The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

STATEMENT OF THE CASE

On March 9, 1996, Defendants Cook and Berry, both private bail bond agents,[1] asked Investigator Biles of the Aurora Illinois Police Department to help them apprehend Plaintiff June Franklin at her job in DuPage

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[1] Cook and Berry were employed by the Georgia Fugitive Apprehension Bureau which, despite its name, is not a public entity.

County, Illinois. Second Am.Compl. at pars. 15 and 17. After being apprised of this request, Corporal Guzlas, a DuPage County Illinois Deputy Sheriff, was dispatched to meet Defendants Cook and Berry at a gas station across the street from the Arby's restaurant where June Franklin was employed. Second Am.Compl. at par. 19. The Arby's restaurant was located in an unincorporated area of DuPage County just outside of the municipal boundaries of the City of Wheaton.

Corporal Guzlas accompanied Cook and Berry to the Arby's restaurant where they took custody of Plaintiff June Franklin. Second Am.Compl. at par. 21. Cook and Berry transported Franklin to Aurora where they then solicited the assistance of Aurora officers in the apprehension of Plaintiff Karen Huff. Second Am.Compl. at pars. 22 and 27. Aurora and DuPage County authorities allegedly permitted Cook and Berry to remove plaintiffs from the scene of Huff's arrest without police escort or assurance that plaintiffs would be taken to Kane County, Illinois for extradition proceedings. Second Am. Compl. at par. 35. Plaintiffs allege that Defendants Cook and Berry subsequently removed them from the state, threatened them with physical harm and sexually assaulted them. Second Am.Compl. at pars. 47-53.

Plaintiffs filed a federal civil rights action against the DuPage County Sheriff's Department and the Sheriff, solely in his official capacity as Sheriff for the Sheriff's Department, alleging that the sheriff failed to train and supervise his deputy and he failed to have in place policies and procedures to insure that citizens apprehended by his deputy or with his deputy's assistance are safeguarded and processed according to law. Second Am.Compl. at pars. 11, 13 and 67.

In the District Court, Petitioner moved to dismiss the DuPage County Sheriff's Department on the grounds that it is not a suable entity under Illinois law. Additionally, Petitioner asserted sovereign immunity and moved to dismiss the official capacity claims against the DuPage County Sheriff based on the considerations set forth in *McMillian v. Monroe County, Alabama,* 520 U.S. 781 (1997). The District Court granted Petitioner's motion to dismiss the DuPage County Sheriff's Department. (App. 7). However, Petitioner's motion to dismiss the official capacity claims on grounds of sovereign immunity was denied. (App. 9).

Petitioner immediately appealed the denial of sovereign immunity to the United States Court of Appeals for the Seventh Circuit. The Seventh Circuit affirmed the denial of sovereign immunity on July 17, 1998. (App. 1-6). In its Opinion, the appellate court recognized that the Illinois Supreme Court "has held that counties may not be held liable under *respondeat superior* for the actions of their sheriffs. . . ." (App. 5). Referring to its own prior decisions in *Ryan v. County of DuPage,* 45 F.3d 1090 (7th Cir. 1995) and *Thompson v. Duke,* 882 F.2d 1180 (7th Cir. 1989), *cert. denied,* 495 U.S. 929 (1990), the appellate court conceded that an Illinois sheriff is not a policymaker for the county. (App. 5). Though the court of appeals thus held that the County of DuPage could not be held liable for actions of the sheriff, it nonetheless rejected the contention that the Sheriff was a state officer entitled to sovereign immunity in his official capacity. The court of appeals rested its declination of immunity on language it has used in its own prior decisions that "the sheriff is an agent of the sheriff's department, an independently

elected office that is not subject to the control of the county. . . ." (App. 5). The appellate court further reasoned that "[a]lthough the relationship between county boards and county sheriffs is a complicated one, the relevant feature of that relationship for purposes of this case is the lack of any suggestion that the sheriff is an agent of the state in performing general law enforcement duties." (App. 6) Thus, the court found that the Sheriff's Department was a properly suable entity for purposes of fixing liability under *Monell v. New York Dept. of Social Servs.*, 436 U.S. 658 (1978). (App. 6). The Petitioner filed a timely petition for rehearing before the Seventh Circuit, which was denied on August 28, 1998. (App. 10).

REASONS FOR GRANTING THE WRIT

I.

The Seventh Circuit Infringed On The State Of Illinois' Sovereign Right To Determine Its Own Structure Of Government By Judicially Declaring The Existence Of A Suable Governmental Entity Which Is Nonexistent Under The Laws Of The State Of Illinois.

The Seventh Circuit's proclamation that the Sheriff's Department is a suable *Monell* entity violated principles of federalism in at least three important respects. First, it undermines Illinois sovereignty by declaring the existence of an entity which is non-existent under Illinois law. Second, the court of appeals' recognition of a suable sheriff's department impermissibly negated the Illinois Supreme Court's holding that Illinois Counties may not be held liable for the actions of the Sheriff. *Moy v. County of Cook,* 159 Ill.2d 519 (1994). Third, by

creating a suable sheriff's department, the court of appeals disregarded, without discussion, a myriad of Illinois statutory provisions establishing, under the approach mandated in *McMillian v. Monroe County, supra,* that Illinois Sheriffs are state officers who cannot be sued in their official capacities consistent with the Eleventh Amendment.[2] The Seventh Circuit's circumvention of *McMillian* is conspicuous since this Court recognized that an "Illinois sheriff does not set county policy. . . ." *McMillian,* 117 S.Ct. at 1742, nt. 10, *citing Thompson v. Duke, supra.*

A. The Designation Of The Sheriff's Department As A Suable Entity Violated Principles Of Federalism Because No Such Entity Exists Under Illinois Law.

Under our system of federalism there exists an indestructible sovereign federal government which is comprised of indestructible sovereign states. "It is incontestable that the Constitution established a system of 'dual sovereignty.' *Gregory v. Ashcroft*, 501 U.S. 452, 457, 111 S.Ct. 2395, 2399, 115 L.Ed.2d 410 (1991); *Tafflin v. Levitt*, 493 U.S. 455, 458, 110 S.Ct. 792, 795, 107 L.Ed.2d 887 (1990)." *Printz v. U.S.,* 521 U.S. 98,

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[2] As set forth in *Kentucky v. Graham*, 473 U.S. 159, 165 (1985), a suit against a governmental officer in his official capacity is suit against the entity of which the officer is an agent. "As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity." *Id.* If the DuPage County Sheriff had been determined to be a state official, the official capacity claims against him would have been barred by the Eleventh Amendment, *McMillian v. Monroe County, Ala.*, 520 U.S. 781 (1997).

117 S.Ct. 2365, 2376 (1997). "The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States. *Texas v. White*, 7 Wall. 700, 725, 19 L.Ed. 227 (1869), quoting *Lane County v. Oregon*, 7 Wall. 71, 76, 19 L.Ed. 101 (1869)." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991).

In *Monell,* this Court recognized that Congress' concerns of federalism were of great significance at the time that the civil rights act was adopted in 1871. In a passage which foreshadowed the instant dispute, the Court quoted the position of Representative Blair at length, which in pertinent part is as follows:

> . . . [T]here are certain rights and duties that belong to the States, . . . there are certain powers that inhere in the State governments. They create these municipalities, they say what their powers shall be and what their obligations shall be. If the Government of the United States can step in and add to those obligations, may it not utterly destroy the municipality? If it can say that it shall be liable for damages occurring from a riot, . . . where [will] its power . . . stop and what obligations . . . might [it] not lay upon a municipality. . . .

Id., 436 U.S. at 674.

Representative Blair's views were reflective of those of the framers, expressed succinctly by James Madison in The Federalist No. 45:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. . . . The powers reserved to the several States will extend to all the objects which, in the ordinary

> course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

It was against this backdrop of a belief in a federalist system, that the Tenth Amendment to the Constitution was adopted in 1791. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or the people." U.S. Const., Amend. X. Though the broad rights granted to the states were tempered by the adoption of the Fourteenth Amendment, this Court's precedents, too numerous to mention, lay testament to the continued federal deference accorded the independence of state government, as embodied in the doctrine of our federalism.

These principles of federalism are at the root of several of this Court's decisions in the area of municipal liability under § 1983. For instance, *Monell* itself was predicated on the notion that creation of *respondeat superior* liability under § 1983 would constitute an unacceptable intrusion into the operation of state government. 436 U.S. at 691. More recently, the Court summarized the need for federal restraint in *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989).

> In *Monell*, this court recognized that Congress had concerns regarding its constitutional authority to require local units of state government to keep the peace. *Monell*, 436 U.S. at 673. In *Monell*, the court reviewed Congress' rejection of the proposed Sherman Amendment, which would have imposed liability on municipalities for the acts of third parties. Congress rejected the Sherman Amendment because, in its view, "the Federal Government could not

> constitutionally require local governments to create police forces. . . ."

Id., 491 U.S. at 65. Certainly, the States have the sovereign right to determine their own structure of government. Many of the states, including Illinois, have a long historical precedent in the manner and methods they use to enforce their laws and perform the executive functions of the state—they vary from state to state and are rooted in the history of their early settlers. If a State chooses to administer its laws through officers and agencies that do not have a legal corporate existence independent of the State, a Federal Court lacks the authority to declare the existence of an independent suable entity for purposes of imposing Monell liability. *Id.* (holding that the Michigan Department of State Police is not a suable entity under Section 1983).

All of the requirements imposed by Congress in Section 1983 must be strictly adhered to. Otherwise, the rights of the states under our system of federalism will be jeopardized and the decisions of our lower federal courts will be in excess of their jurisdiction. For example, in *Board of County Comm'rs of Bryan County, Okl. v. Brown*, 117 S.Ct. 1382 (1997), this Court recognized that the failure to adhere to the causation requirement of Section 1983 had federalism implications.

> As we recognized in Monell and have repeatedly reaffirmed, Congress did not intend municipalities to be held liable unless deliberate action attributable to the municipality directly caused a deprivation of federal rights. A failure to apply stringent culpability and causation requirements raises serious federalism concerns. . . .

Id., at 117 S.Ct. at 1394.

These federalism concerns also require a careful analysis of state law as a precondition to the designation of a suable entity in a § 1983 case against state officers with limited territorial jurisdiction. Such an analysis in this case would have established three controlling points, as developed below: (1) that the Illinois Supreme Court had rejected the notion of county liability for a sheriff's acts; (2) there is no independent suable entity known as the "sheriff's department"; and (3) under Illinois law, sheriffs are state officers. Because the Seventh Circuit failed to consider whether the "Sheriff's Department" existed as a suable entity under state law, it follows that the court's decision neither avoided federalism concerns nor preserved the sovereign rights of the State of Illinois.

B. The Seventh Circuit's Recognition Of A Suable Sheriff's Department Impermissibly Negated The Illinois Supreme Court's Holding In *Moy v. County Of Cook* That Illinois Counties May Not Be Held Liable For Actions Of Illinois Sheriffs.

In *Moy v. County of Cook, supra,* the Illinois Supreme Court held Illinois sheriffs are independent constitutional officers who are not subject to the control of the county, that Illinois sheriffs are not agents of the county, and that Illinois counties cannot be held liable under *respondeat superior* for the actions of a sheriff. While paying lip service to *Moy's* holding that an Illinois sheriff does not act on behalf of the county when engaged in law enforcement functions, the Seventh Circuit nonetheless circumvented congressional intent by declaring the existence of a "sheriff's department" for the purpose of imposing *Monell* entity liability. (App. 5).

Because, as we explain below, the sheriff's department has no existence under Illinois law, the lower court's declaration, in essence, negated *Moy*; and, thereby, exceeded the constitutional limitations on federal intrusion into state government under the Tenth Amendment. The Seventh Circuit essentially viewed the Illinois Supreme Court's seminal decision in *Moy* as a mere "wrinkle" in its path to finding the existence of a suable *Monell* entity. (App. 5).

C. There Is No Entity Known As The Sheriff's Department Under Illinois Law.

The appellate court's approach was a superficially appealing, yet structurally unsound circumvention of *Moy*. When this case was pending before District Court Judge Zagel, he recognized that the "Sheriff's Department" was not a suable entity and he entered an order dismissing it from the case. (App. 7) In a recent case involving an Indiana police department, the Seventh Circuit acknowledged: "The naming of the Town's Police Department as a defendant adds nothing; it is almost certainly not a suable entity separate from the Town." *West v. Waymire*, 114 F.3d 646 (7th Cir. 1997). Every other court that has considered whether a "sheriff's department" or "police department" is a suable entity under Illinois law has determined that they are not. *See, Foster v. Unknown Cook County Deputy Sheriff*, 914 F.Supp. 221, 224 (N.D.Ill. 1995); *Magnuson v. Cassarella*, 812 F.Supp. 824, 827-8 (N.D.Ill. 1992); *Jordan v. City of Chicago, Dept. of Police*, 505 F.Supp. 3-4 (N.D.Ill. 1980); *Mayes v. Elrod*, 470 F.Supp. 1188, 1192 (N.D.Ill. 1979).

In *Magnuson,* the court stated:

> Cook County Sheriff's Police Department ("CCSPD") claims that it is a non-suable entity, and therefore must be dismissed from this case. The federal courts look to state law to determine if a defendant is amenable to suit. Fed.R. Civ.P. 17(b). To be sued in Illinois, a defendant must have a legal existence, either natural or artificial. *Jackson v. Village of Rosemont*, 180 Ill.App.3d 932, 937-38, 129 Ill.Dec. 670, 673, 536 N.E.2d 720, 723 (1st Dist. 1988). Illinois law provides that CCSPD is to be maintained as a "division" of the Sheriff of Cook County, consisting of deputy sheriffs charged with the duty of law enforcement. Ill.Rev.Stat. ch. 34, ¶ 3-7001 (1992). Further, a review of the Sheriff's responsibility over such deputy sheriffs reveals that CCSPD does not enjoy a separate legal existence apart from the Sheriff of Cook County, and therefore is not a suable entity.

Magnuson, 812 F.Supp. at 827-8.

An examination of the Illinois statute that created the division under the Sheriff known as the "County Police Department" shows irrefutably that no such entity by that name can be a suable entity under Illinois law. The statute states the following:

> § 3-7001. Maintenance of county police department. The Sheriff in each county having more than 1,000,000 inhabitants shall maintain a division to be known as the County Police Department and to consist of such deputy sheriffs charged with the duty of law enforcement in such county as may be selected as hereinafter provided.

55 ILCS 5/3-7001.[3]

It was only after this statute was enacted in 1963 that the phrases "sheriff's department", "sheriff's police department", and "county police department" began appearing in reported Illinois decisions. *See, e.g., Roberts v. Illinois Liquor Control Com'n*, 58 Ill.App.2d 171 (1st Dist. 1965) (first case referencing "sheriff's department"). For two equally compelling reasons, however, the use of such terms cannot create a suable entity with a relationship to the DuPage County Sheriff. First, DuPage County does not have in excess of one million inhabitants. Therefore, the term "County Police Department" cannot refer to an entity in DuPage County, since the statute only applies to sheriffs in counties with more than one million inhabitants.[4] Second, the term "County Police Department," as stated in the statute, merely refers to the name of a "division" that is to be maintained by the sheriff for purposes of identifying deputies that have been selected under the merit selection laws that are set forth in the statutes. The term "County Police Department" literally refers to

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[3] Cook County is the only county in Illinois that has over one million inhabitants.

[4] In 1967 the Illinois Legislature enacted the County Police Department Act which did apply to sheriff in counties with a population under one million. Ill.Rev.Stat., ch 125, par. 101 et seq. (repealed). However, the County Police Department Act was repealed and replaced by the Sheriff's Merit System Law in 1981. 55 ILCS 5/3-8001, et seq. The Sheriff's Merit System Law, which remains in effect, has no provisions pertaining to the maintenance of a division known as the "County Police Department" or "Sheriff's Department." The deputies that are appointed pursuant to the Sheriff's Merit System Law are merely referred to as sheriff's personnel. *Id.*

the deputies so selected. The term "County Police Department" does not refer to a governmental corporation with a capacity to sue and be sued. Clearly, when this court decided *Monell*, it did not envision a division comprised of subordinate state officers being held civilly responsible for policies made by their superior officer.

Article IV, Section 4 of the Constitution guarantees to each state a republican form of government. The method chosen by a state to provide for its representative form of government is its sovereign prerogative. *Gregory v. Ashcroft*, 501 U.S. 452 (1991).[5] Illinois has chosen its own method of delegating its law enforcement powers throughout the state. It is the sovereign right of the state of Illinois to choose sheriffs as its law enforcement representatives within the boundaries of the counties from which they are elected. The federal courts are prohibited under our system of federalism from altering these state statutory schemes, by creating fictional entities for purposes of fixing official liability for sheriffs, to circumvent the Eleventh Amendment.

In *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 70 (1989), this court stated the following when it prohibited a Section 1983 plaintiff from suing a state official in his official capacity:

> Obviously, state officials literally are persons. But a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office.

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[5] In *Gregory*, this court upheld the Missouri Constitution's mandatory retirement provision in a challenge brought by Missouri state judges under the Federal Age Discrimination in Employment Act.

> . . . As such, it is no different from a suit against the State itself. . . . We see no reason to adopt a different rule in the present context, particularly when such a rule would allow petitioner to circumvent congressional intent by a mere pleading device.

Likewise, the Seventh Circuit cannot be permitted to circumvent congressional intent by permitting a Section 1983 plaintiff to merely tack on to its pleading the name of an entity that does not exist under state law. If the plaintiffs were prohibited from using the "official capacity" pleading convention and were required to name the governmental entity being sued, any subsequent judgment against the "Sheriff's Department" would be worthless. The Plaintiff would have no legal entity to turn to for satisfaction of such a judgment since no such entity exists under Illinois law. The sheriff would have no obligation to satisfy the judgment, nor would the county. Federal courts must rigorously restrict such artificial pleading devices in order to avoid federalism concerns.

D. The Seventh Circuit's Failure To Consider Whether Petitioner Was A State Officer, As Opposed To A County Officer, Deprived Petitioner Of Sovereign Immunity, In Contravention Of The Approach Mandated By *Mcmillian v. Monroe County, Alabama*, 117 S.Ct. 1734, 1737 (1997).

The question of whether an Illinois sheriff is a policymaker for the state or for the county is dependent on an analysis of state law. *McMillian v. Monroe County, Alabama,* 117 S.Ct. 1734, 1737 (1997). In *McMillian*, this court deemed it critically important that the Alabama Supreme Court determined that "Alabama counties are not liable under a theory of *respondeat superior*

for a sheriff's official acts that are tortious." *Id.*, at 1738-9. The Illinois Supreme Court has made the identical decision with regard to Illinois sheriffs. *Moy*, *supra*. Additionally, in the case below, the Seventh Circuit disregarded, without discussion, a myriad of Illinois statutory provisions that under the approach mandated in *McMillian* establish Illinois sheriffs as state officers. Notwithstanding the fact that the Illinois statutory scheme was fully set forth when this case was before the Seventh Circuit, the court inaccurately stated: "Although the relationship between county boards and county sheriffs is a complicated one, the relevant feature of that relationship for purposes of this case is the lack of any suggestion that the sheriff is an agent of the state in performing general law enforcement duties." (App. 6).

1. The Illinois Supreme Court Has Declared That An Illinois County Cannot Be Held Liable Under *Respondeat Superior* For The Actions Of A Sheriff.

In *Moy v. County of Cook, supra,* the Illinois Supreme Court recognized that Illinois sheriffs are independent constitutional officers who are not subject to the control of any unit of local government. "Clearly, the sheriff's statutory duties . . . are independent of and unalterable by any governing body." *Moy*, 159 Ill.2d at 527. The court held that an Illinois sheriff is not an agent of the county, and the county cannot be held liable under *respondeat superior* for the actions of the sheriff.[6] As a

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[6] *Moy* overruled a lower Illinois appellate court that held that an Illinois county would be liable for the actions of the sheriff,

(continued...)

result of its holding in *Moy*, the Illinois Supreme Court affirmed the dismissal with prejudice of all of the claims brought against the county, including a Section 1983 claim.[7] The Illinois Supreme Court's decision that interprets Illinois law is more than a "wrinkle" to be ignored—it is entitled to deference by all federal courts.

2. Under Illinois Statutes, Sheriffs Act As State Law Enforcement Officials.

This Court has recognized that the "actual function of a governmental official, in a particular area, will necessarily be dependent on the definition of the official's functions under relevant state law." *McMillian*, 117 S.Ct. at 1737. However, this Court clearly rejected the acceptance of labels or nomenclature as a means of determining an Alabama sheriff's relationship to the state. In *McMillian*, the court stated: "[O]ur inquiry is dependent on an analysis of state law. . . . This is not to say that state law can answer the question for us by, for example, simply labeling as a state official an official who clearly makes county policy." *Id.*, 117 S.Ct. at 1737.

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[6] (...continued)
notwithstanding the fact that Illinois sheriffs are independent constitutional officers who are not subject to the control of the county. *See Moy*, 159 Ill.2d at 524-5, *overruling Holda v. County of Kane*, 88 Ill.App.3d 522 (1980).

[7] The fact that a Section 1983 claim was affected by the Illinois Supreme Court's decision is more clearly set forth in the opinion published by the lower state appellate court, wherein the court stated: "[T]he circuit court correctly dismissed the Section 1983 count . . . ." *Moy v. County of Cook*, 244 Ill.App. 3d 1034, 1039 (1993).

a. Under Illinois Law, County Government Cannot Control Sheriffs.

In *McMillian*, 117 S.Ct. at 1739, this Court found that four provisions in the Alabama Code indicated that sheriffs were state officers. The same or substantially similar statutory provisions exist under Illinois law:

(1) Sheriffs are required to "attend upon" and "obey the lawful orders" of the state courts, 55 ILCS 5/3-6023;

(2) County treasurers lack authority over sheriffs, 55 ILCS 5/3-6018;

(3) The "powers and duties" of counties do not include any provision in the area of law enforcement, 55 ILCS 5/5-1005; and

(4) County boards cannot instruct the sheriff "how to ferret out crime, how to arrest a criminal, or how to secure evidence of a crime." 55 ILCS 5/3-6021 and 5/5-1087.

The sheriff's law enforcement duties are imposed upon him by the state. The Illinois Legislature has designated each sheriff as a "conservator of the peace in his or her county," and has imposed the duty upon sheriffs to "prevent crime and maintain the safety and order of the citizens of that county;" and has authorized sheriffs to "arrest offenders on view, and cause them to be brought before the proper court for trial or examination." 55 ILCS 5/3-6021. The Illinois Legislature requires sheriffs to serve, execute and return all warrants, process, orders and judgments that are legally directed to his or her attention. 55 ILCS 5/3-6019. The Illinois Legislature requires sheriffs to attend all courts and to obey all lawful orders and directions of the court. 55 ILCS 5/3-6023. The Illinois Legislature also

imposes the duty of the care and custody of the courthouse and jail upon the sheriff. 55 ILCS 5/3-6017. State law specifically imposes these duties, powers and function on sheriffs. Therefore, the county board lacks authority to alter them. 55 ILCS 5/5-1087. Furthermore, a county board cannot interfere with the internal operations of a sheriff's office. 55 ILCS 5/3-6018. However, by contrast, Illinois law does confer law enforcement power on cities and villages and their "corporate officers." 65 ILCS 5/3.1-15-25; 65 ILCS 5/11-1-1 and 11-1-2.

In his concurring opinion in *Monell*, Justice Powell recognized that Congress found it abhorrent to constitutional principles to place liability on municipalities for failing to maintain the peace when many of them did not have law enforcement powers under state law.

> The opposition in the House of Representatives focused largely on the Sherman amendment's attempt to impose a peacekeeping obligation on municipalities when the Constitution itself imposed no such affirmative duty and when many municipalities were not even empowered under state law to maintain police forces.

Monell, 436 U.S. at 706 (Justice Powell concurring). The distribution of law enforcement power under Illinois law is not unlike the structures of government that caused Congress to have federalism concerns at the time Section 1983 was enacted, in that not all units of local government have peace keeping power under Illinois law.

b. Under Illinois Law, Sheriffs Are Under The Control Of The State, State Agencies And Other State Officers When Exercising Law Enforcement Functions.

Under Illinois law, every sheriff is "commissioned by the Governor." 55 ILCS 5/3-6001. The state regulates and supervises Illinois sheriffs through state agencies and other state officers. Each year, sheriffs are required to participate in law enforcement training approved by the Illinois Law Enforcement Training Standards Board. 55 ILCS 5/3-6007. The Illinois Law Enforcement Training Standards Board was created by the State Legislature to "promote and protect citizen health, safety and welfare" and for the purpose of raising "the level of law enforcement by upgrading and maintaining a high level of training and standards for law enforcement executives, officers, county corrections officers, sheriffs, county coroners, and law enforcement support personnel . . . ." 50 ILCS 705/1. The Illinois Law Enforcement Training Standards Board reviews and approves training curriculum for all new officers and is mandated to include courses, refresher courses, and advanced training on the entire gamut of law enforcement duties performed by Illinois sheriffs. 50 ILCS 705/1; 50 ILCS 705/10.1. An officer must satisfactorily complete a course approved by the Illinois Law Enforcement Training Standards Board in order to be eligible for permanent employment. 50 ILCS 705/7(f).

Pursuant to the provision of the County Jail Act, 730 ILCS 125/1 et al., the sheriff is the warden of the county jail, 730 ILCS 125/2, he is responsible for the care of the prisoners, 730 ILCS 125/17, and he is responsible for keeping the jail in a clean and healthful condition,

730 ILCS 125/18. The jail is inspected annually by at least three members of the grand jury. The grand jury is required to report violations of the county jail act to the court. 730 ILCS 125/22. The sheriff is subject to a fine if he fails to comply with any of the provisions of the act. 730 ILCS 125/24.

The sheriff, in the operation of the jail, is also subject to comprehensive regulations imposed upon him by the State of Illinois Department of Corrections. 730 ILCS 5/3-15-2. At least once each year, the Department can inspect the jail for compliance with the standards established and the Department makes the results of the inspection available for public review. *Id.* If the jail is not brought into compliance with the Department's regulations, the Director of the Department can petition an appropriate court for an order requiring the jail to be brought into compliance. *Id.* The County Jail Standards that are promulgated by the Department of Corrections are set forth at 20 Ill. Admin. Code, Ch.I, Subch. F, pt. 701 et seq.

When a sheriff engages in misconduct, the county board has no recourse. However, a state's attorney can indict him and upon conviction the sheriff will be removed from office. 720 ILCS 5/33-3. If a prisoner is taken from the sheriff's custody and lynched, the governor may remove him from office. 720 ILCS 5/25/2. The removal statute is another example that the sheriff is under the control of the state and not the corporate authority of the county. The removal statute makes it clear that the chief executive officer of the municipality would remove a municipal officer in the case of a lynching. *Id.*

c. Under The Illinois Constitution, Sheriffs Are Considered State Officers.

Under the Illinois Constitution, the sheriff is considered a "holder of a State office" for the purpose of subscribing to the State's oath of office. Ill. Const. (1970), art. XIII, sec 3. Specifically, Article XIII, Section 3 of the Illinois Constitution provides:

> Each prospective holder of a State office or other State position created by this Constitution, before taking office, shall take and subscribe to the following oath or affirmation:
>
> > "I do solemnly swear (affirm) that I will support the Constitution of the United States, and the Constitution of the State of Illinois, and that I will faithfully discharge the duties of the office of . . . to the best of my ability."

Each sheriff is required to take the State's oath of office pursuant to 55 ILCS 5/3-6004. This oath is also a requirement of Article VI of the United States Constitution which provides the following in pertinent part: "[A]ll executive . . . officers, both of the United States and of the several States, shall be bound by oath or affirmation to support this Constitution. . . ."

Under the Illinois Constitution of 1818, the office of sheriff, along with the office of governor, was provided for under the Executive Article. Ill. Const. of 1818, art. III, sec. 11. Article III of the Illinois Constitution of 1818 stated the following, in pertinent part:

> Sec. 1. The executive power of the state shall be vested in a governor.
>
> . . .

> Sec. 11. There shall be elected in each and every county in the said state, . . . one sheriff and one coroner. . . .

Under the present Illinois Constitution, sheriffs "have those duties, powers and functions provided by law. . . ." Ill. Const. of 1970, art. VI, sec. 4(d). Additionally, Illinois sheriffs "have the duties, powers or functions derived from common law or historical precedent. . . ." *Id.* The duties imposed upon the sheriff by law, as shown above, and by historical precedent show that Illinois sheriffs function as an executive officers of the state.

The obligation of a state to deliver up a fugitive from justice arises under Article IV of the United States Constitution, which provides the following in pertinent part:

> Section 1. Full faith and credit shall be given in each State to the public acts, records, and judicial proceeding of every other State. . . .
>
> Section 2. . . . (2) A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.

Any policy of the sheriff pertaining to the delivery of a fugitive from justice is clearly a policy enacted in furtherance of his duties as a constitutional officer of the State.

CONCLUSION

For the foregoing reasons, Petitioner Sheriff John Zaruba, in his official capacity as DuPage County Sheriff, respectfully submits that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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